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U.S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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NOV 18 2009

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
SRC 07 800 25701

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a teacher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer -
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 29, 2007. The petitioner stated:

> I . . . have the education, skills and experience to teach the following:
>
> - Adult Education Programs (especially to speakers of languages other than English)
> - English as a Second Language (ESL) to K-8 and adults.
> - Single Subject in Punjabi.

> I have experience in **providing foreign language translation services (Hindi/Punjabi – English)** to companies, and government entities.
>
> . . . [T]here are considerable efforts by different states to attract and retain highly qualified teachers. As a consequence of these recruitment efforts, some states are losing teachers to other states. . . .
>
> [W]ith the education, experience, skills and unique perspective I have of the immigrant experience, I believe **I can have more of an impact beyond those of currently existing teachers in the educational system**.

(Emphasis in original.) The petitioner asserted that she will be able to serve the national interest under the No Child Left Behind Act, as well as the National Security Languages Initiative, because of her teaching and language skills. At the time she filed the petition, the petitioner was employed as a substitute teacher.

Certificates and witness letters submitted with the petition established that the petitioner is a qualified teacher, but did not set her apart from other qualified teachers to any meaningful extent. The petitioner's fluency in Hindi and Punjabi would not appear to distinguish her significantly from large numbers of other teachers who, like her, were born in India.

On September 24, 2008, the director instructed the petitioner to submit evidence that her work is national in scope, and evidence of "impact beyond those of currently existing teachers in the education system." In response, the petitioner submitted a letter from [redacted] of the National Council on Teacher Quality, who stated:

> Under No Child Left Behind, the federal government requires a Highly Qualified Teacher in every classroom. . . .
>
> Throughout the United States, many school districts face severe shortages of Highly Qualified Teachers. . . .
>
> Based on the credentials supplied to us by [the petitioner], she would more than meet No Child Left Behind's definition of a Highly Qualified Teacher of English as a Second Language. She would also meet requirements for No Child Left Behind's definition of a Highly Qualified Teacher in Foundational Math.

A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. *Matter of New York State Dept. of Transportation* at 215, 218. [redacted]'s letter discussed why an adequate supply of qualified teachers is in the national interest, but

did not explain why this one petitioner, in particular, should receive a special immigration benefit not normally extended to members of her profession.

With respect to prior achievements, the petitioner stated that she had qualified for licensure in Manitoba, and was "convinced" that she could qualify for California licensure as well. The petitioner submitted a copy of her Preliminary Multiple Subject Teaching Credential, issued shortly before she filed the petition. The petitioner stated that she had "been a volunteer Sunday school teacher teaching Punjabi Language and Culture in classes . . . at the local Sikh Temple," and that she began teaching at North Orange County Community College in November 2007. This last employment did not begin until several months after the petition's July 2007 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The petitioner also stated that her "teaching experience . . . in international settings" gave her "a distinct and unique advantage over other teachers in the system in terms of experience." The petitioner did not explain exactly what this "unique advantage" was, apart from "a deeper understanding of the difficulties facing adults and children of immigrant population and minorities." The petitioner seems, here, to argue that she qualifies for the national interest waiver because she trained and worked as a teacher outside the United States. The same can be said of countless other teachers who hope to immigrate to the United States. Therefore, even if the petitioner's international background conveyed some advantage over native-born United States teachers, it fails to distinguish her from other intending immigrants. The latter distinction, however, is the crucial one, because the petitioner seeks a special immigration benefit, in the form of an exemption from a requirement that would normally apply to intending immigrants in the petitioner's profession. We cannot find that the petitioner's foreign birth and upbringing distinguish her from other aliens seeking to immigrate to the United States.

Congress created no blanket waiver for foreign-trained teachers. Rather, Congress made it clear that the job offer/labor certification requirement normally applies to members of the professions, which (according to section 101(a)(32) of the Act) includes teachers.

The director denied the petition on February 23, 2009, stating that the petitioner cannot qualify for the waiver simply by demonstrating that she is a qualified teacher. The director did not dispute the intrinsic merit of the petitioner's occupation, but found that the petitioner had not established the national scope of her work, or meaningfully distinguished herself from other qualified teachers.

On appeal, the petitioner argues that she has provided sufficient documentation of her credentials as a teacher. This argument is irrelevant, because the director did not find that the petitioner is unqualified to work as a teacher. Being a qualified, credentialed teacher makes the petitioner a member of the professions, but it does not automatically qualify her for the national interest waiver.

The petitioner discusses the language of the statute and notes that the national interest waiver is available to members of the professions holding an advanced degree. The director did not dispute this point. The ability of such aliens to apply for the waiver, however, does not require USCIS to approve those applications. No reasonable reading of section 203(b)(2) of the Act would support the conclusion that Congress abolished the job offer requirement for members of the professions holding an advanced degree.

Turning to *Matter of New York State Dept. of Transportation*, the petitioner states that the wording of the precedent decision "would seem to suggest that all merits of the alien is [*sic*] to be given due consideration." She did not, however, explain what particular factors distinguish her from other aliens in her profession.

The petitioner notes that 20 C.F.R. § 656.18 "seems to offer more flexibility to the hiring of foreign college and university teachers." The cited Department of Labor regulation does not relate directly to the national interest waiver. Rather, it sets forth modified procedures by which certain aliens may receive labor certification. The petitioner asserts: "I believe that by virtue of my prior experience . . . [I] would qualify for this limited exception" described in the above regulation. The "limited exception," however, applies only to "college and university teachers" hired through a "competitive selection and recruitment process." The petitioner has not claimed any qualifying job offer from a college or university. Furthermore, because the procedures described in the regulation are a variation of labor certification, rather than an exemption from labor certification, a petition for such an alien would have to be filed by the intending United States employer, not by the alien on his or her own behalf. *See* 8 C.F.R. § 204.5(k)(4)(i). The regulation the petitioner cites has no bearing on the present proceeding.

The petitioner explains why she believes she may qualify "for TN visa as an ESL instructor wherein labor certification is waived." She argues that, because that classification would not require labor certification, USCIS should "waive the job offer requirement for this category as well." Each immigrant and nonimmigrant classification has its own unique statutory and regulatory requirements. The petitioner seeks benefits under section 203(b)(2) of the Act and 8 C.F.R. § 204.5(k), and we cannot arbitrarily substitute the requirements of other classifications.

The petitioner notes that her spouse, a permanent resident of the United States, has filed a Form I-130 immediate relative petition on her behalf. She requests "interfiling pending I-485 to pending I-130 file" and "cross country chargeability to that of [her] spouse." These requests do not relate to the appeal now under consideration, and the AAO has no jurisdiction over these requests. The petitioner should address these requests to the Service Center adjudicating the immediate relative petition.

For reasons explained above, the petitioner has not shown that she qualifies for a national interest waiver. The petitioner's main arguments are broad and general, failing to single her out in any meaningful way. Repeated references to a teacher shortage beg the question of why the petitioner cannot obtain a labor certification, in the claimed absence of qualified United States workers.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.